CHI LIUNG HOLDINGS SDN. BHD.

v.

NG PYAK YEOW

COURT OF APPEAL, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI JCA
DATO HJ. ABDUL MALEK B. HJ. AHMAD J
DATO' WIRA HJ. MOHD NOOR B. HJ. AHMAD J
[CIVIL APPEAL NO. J-02-94 OF 1994]
25 AUGUST 1995

PRACTICE & PROCEDURE: *Proceedings against liquidator - Companies winding up - Leave of Court - Whether a prerequisite - Failure to obtain leave - Whether fatal - Whether action to be dismissed - Companies Act 1965, ss. 236(3), 305.*

The appellant was the landlord of the premises at Nos. 1-21, Jalan Temoh, Klang, Selangor, which was rented to Rich's Supercentre Sdn. Bhd. (the company). On 10 June 1989, following the company's failure to exercise an option to purchase, the appellant gave the company a month's notice to vacate the premises. By this time, however, winding up proceedings against the company had been commenced by a third party, and this culminated in a winding up order made by the Court on 7 December 1989. On 12 December 1989 the liquidator surrendered the premises to the appellant but not the rentals for the months of June to December which had fallen into arrears. The appellant filed an originating motion in the High Court and claimed the arrears at double the rental from the liquidator. In so doing, however, the appellant had not obtained leave of the Court.

The trial Judge ruled that the appellant, by its failure to obtain leave, had contravened s. 226(3) of the Companies Act, and that being the case, the motion was held to be not properly before the Court and was therefore dismissed. The appellant appealed and argued that no leave was required as the motion was not against the company but against the liquidator personally.

Held:

Per Abu Mansor Ali JCA (delivering the judgment of the Court):

[1] A liquidator, having been appointed by the Court, is an officer of the Court. It goes without saying that leave of the Court is needed before an action is commenced against him and officers like him. The appellant hence should have obtained leave before making his application below.

[2] The learned Judge was right in dismissing the appellant's motion but not for the reasons he cited, as s. 226(3) only applies where the action is against the company.

[3] As the action here was against the liquidator, the appellant's motion clearly came under s. 305 of the Companies Act. This notwithstanding, the appellant must have first obtained authority from the winding up Judge before proceeding against him, and not proceeded independently, as was done here.

[Appeal dismissed]

[**Bahasa Malaysia** Translation of Headnotes]

AMALAN & PROSEDUR: *Prosiding terhadap penyelesai - Penggulungan syarikat - Kebenaran Mahkamah - Samada merupakan satu prasyarat - Kegagalan untuk mendapatkan kebenaran - Samada memudaratkan - Samada tindakan harus ditolak - Akta Syarikat 1965, ss. 236(3), 305.*

Perayu merupakan tuan rumah bagi premis di No. 1-21, Jalan Temoh, Klang, Selangor, yang mana telah disewakan kepada Rich's Supercentre Sdn. Bhd. (syarikat tersebut). Pada 10 Jun 1989, berikutan kegagalan syarikat tersebut untuk melaksanakan opsyen untuk membeli, perayu telah memberikan syarikat tersebut notis selama satu bulan untuk mengosongkan premis tersebut. Walaubagaimanapun, ketika itu, satu prosiding penggulungan terhadap syarikat tersebut telah dimulakan oleh pihak ketiga, dan ini membawa kepada satu perintah penggulungan dibuat oleh Mahkamah pada 7 Disember 1989. Pada 12 Disember 1989 penyelesai telah menyerahkan premis tersebut kepada perayu tetapi tidak menyerahkan sewaan-sewaan bagi bulan Jun sehingga Disember, yang mana telah menjadi tertunggak. Perayu telah memfailkan satu usul pemula di Mahkamah Tinggi dan menuntut tunggakan-tunggakan tersebut dengan gandaan sewaan daripada penyelesai. Dalam melakukan sedemikian, walaubagaimanapun, perayu telah tidak mendapatkan kebenaran Mahkamah.

Hakim perbicaraan memutuskan bahawa perayu, atas kegagalannya mendapatkan kebenaran, telah melanggari s. 226(3) Akta Syarikat, dan dalam keadaan yang sedemikian, usul tersebut telah diputuskan sebagai tidak sempurna di hadapan Mahkamah dan adalah dengan itu ditolak. Perayu tersebut telah merayu dan berhujah bahawa kebenaran tidak diperlukan kerana usul bukannya terhadap syarikat tetapi terhadap penyelesai secara peribadi.

Diputuskan:

Oleh Abu Mansor Ali, HMR (menyampaikan penghakiman Mahkamah):

[1] Seorang penyelesai, oleh kerana dilantik oleh Mahkamah, adalah merupakan seorang pegawai Mahkamah. Sememangnya tidak perlu disebut bahawa kebenaran Mahkamah diperlukan sebelum sesuatu tindakan dimulakan terhadapnya dan pegawai-pegawai sepertinya. Perayu dengan itu seharusnya mendapatkan kebenaran sebelum membuat permohonannya di bawah.

[2] Adalah betul bagi Tuan Hakim yang bijaksana menolak usul perayu tetapi tidak bagi alasan-alasan yang disebutkan, kerana s. 226(3) hanya terpakai di mana tindakan adalah terhadap syarikat tersebut.

[3] Oleh kerana tindakan disini adalah terhadap penyelesai, usul perayu dengan jelasnya adalah di bawah s. 305 Akta Syarikat. Walaupun demikian, perayu mestilah terlebih dahulu memohon dari Hakim penggulungan sebelum bertindak, dan tidak bertindak dengan bebas, seperti yang dibuat disini.

[Rayuan dibenarkan]

Cases referred to:

Lloyd Owen v. Bull [1936] 4 DLR 273 ***(refd)***

Aliprandi v. Griffith Vintners Pty Ltd (in liq) & Anor. [1991-92] Australian Corporations and Securities Reports Vol. 6 ***(refd)***

Vijayalakshmi Devi d/o Nadchatiram v. Dr Mahadevan s/o Nadchatiram & 4 Ors [1995] 3 AMR 2076 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 226(3), 305

Other sources referred to:
Law Relating to Receivers, Managers and Administrators, Hubert Picarda p. 339
Law of Receivers, P. S. Atchuthen Pillai 2nd Edn., p. 373, para. 27

JUDGMENT

Abu Mansor bin Ali JCA:

On 21 July 1995 we struck out this appeal because we unanimously held that the appeal was not properly before us and we said we would give our reasons at a later date.

The facts as found by the learned Judge were as follows:

Background facts

> Rich's Supercentre Sdn. Bhd. ("the company") rented the premises described as Nos. 1-21, Jalan Temoh, 41400 Klang, Selangor Darul Ehsan ("the premises") from the applicant at the rate of RM30,000 per month and car-park at the rate of RM3,000 per month. A tenancy agreement was executed between the parties on 17 November 1978 for a term of three years (see exhibit TSC-1). Under clause 3.03 the company deposited three (3) months' rental of RM90,000 with the applicant. By way of clause 7.02 the company is given the option to purchase the premises in the event the applicant, as the landlord, shall desire to sell the premises or any part thereof. In the purported exercise of the right under clause 7.02, the applicant *vide* letter dated 22 April 1989 gave the company one month's notice of option to purchase the premises. Apparently the company appeared to have not responded to the offer of option to purchase. The applicant then issued a notice dated 10 June 1989 to that effect and at the same time giving the company one month's notice to vacate the premises by 1 August 1989 for the applicant to exercise its rights under clause 7.02 of TSC-1.
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> At the time the applicant gave the one month's notice to vacate, that is, 10 June 1989, there was already a petition filed in the High Court, Johor Bahru on 15 May 1989 by Success Sports company for the winding-up of the company *vide* companies (winding-up) No. 28 67 of 1989 in which a winding-up order was subsequently made on 7 December 1999 by the High Court. The premises was surrendered to the applicant on 19 December 1989 by the liquidator (see exhibit TSC-3). Apparently, the rents for the months of June to December were not paid and by way of notice dated 7 November 1990 (TSC-3), the applicant claimed the arrears at double rents which make a total sum of RM396,000 and purported to adjust the deposit sum of RM90,000 in which case the sum due should be RM306,000. How in TSC-3 the figure of RM429,000 was arrived at for all arrears due, I do not know. Be that as it may, the applicant is now claiming a sum of RM339,000 (after adjusting the deposit of RM90,000) from the liquidator as arrears of rental due to it from the company. On the other hand, the liquidator filed notice of originating motion No. 25-13-92 dated 2 April 1992 against the applicant (respondent in the case) praying for refund of the deposit of RM180,000 (now agreed by Mr. Ong Ban Chai should be RM90,000). The originating motion of the liquidator, as agreed, was stood down pending the disposal of this originating motion..

The learned Judge found he had two issues for the consideration *vis*:

1. Whether the applicant is entitled to forfeit the deposit of RM90,000 towards the payment of the arrears of rental.

2. Whether the applicant can claim for the arrears of rental from the liquidator by way of this originating motion.

When the learned Judge was at the point of examining issue no. 2 he held:

> In any event, it would seem clear that this originating motion was filed after the winding-up order was made by the Court and thus would require leave of the Court under s. 226(3) of the Act which reads:
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> 3. When a winding-up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except
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> (a) by leave of the Court; and
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> (b) in accordance with such terms as the Court imposes.
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> As s. 226(3) has not been complied with by the applicant, this originating motion, in my view, is not properly before the Court and should therefore be struck out.
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> In the circumstances this originating motion is dismissed with costs.

If the reason for the dismissal of the applicant's application as found by the learned Judge under s. 226(3) of the Companies Act is valid, then that is the end of this matter but it does not appear to us to be so.

At the hearing of this appeal Mr. G.T. Rajan for the appellant submitted that the only issue for the Court to answer was whether leave of Court was indeed necessary before commencing this motion since the motion is against the liquidator personally. He submitted further that it is trite law if the motion is against the company, and the company having been wound up at the motion's commencement, he conceded that leave would have to be obtained first but he submitted, however, that since the motion was against the liquidator personally no leave was required. He submitted further that if, however, the Court's decision was that leave was necessary, the Court was then spared from going into the merit of this application. We adjourned to consider and to give our decision.

At our resumed hearing, we struck off this appeal as we agreed with the learned Judge that the motion, as such, in the first place, required the leave of the Court before it could be brought but not for the reason found by the Judge. Firstly, we read the Powers of Liquidator in s. 236(3) of the Companies Act:

> (3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

We are of the view from the above provision, it is clear that liquidators having been appointed by the Court is an officer of the Court. It goes without saying leave of the Court is needed before an action is commenced against him and officers like him.

We would cite the legal position of receivers who are in the same position as officers of Court. In the text book the *Law Relating to Receivers, Managers and Administrators* by Hubert Picarda at page 339 the learned author wrote:

> A receiver, in the words of Viscount Haldane LC, 'is an officer of the Court put in to discharge certain duties prescribed by the order appointing him'. ... He is 'nothing more than the hand of the Court'. ... for the purpose of holding the property of the litigants, ... and the possession of the receiver is simply the possession of the Court.

Then at page 373 of the textbook *Law of Receivers* by P. S. Atchuthen Pillai 2nd Edition the author wrote in para. 27:

> 27. Suit without leave is contempt of Court and will be dismissed. A suit against a receiver when filed without leave of Court is liable to be dismissed...
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> institution of proceedings against a receiver without leave of the Court is contempt of Court. It is incompatible with the dignity and authority of the Court to allow its officer to be summoned before any tribunal ...

As we have stated we were unanimous that the applicant should have obtained leave before making his application below, for the attitude of a Winding-Up Court has been that some form of leave is required. In the Privy Council case of *Lloyd Owen v. Bull* [1936] 4 DLR 273, where the liquidator of a company was required by the then company law, on an application of stockholders and contributories, to proceed against officers and stockholders of the company, to recover corporate assets wrongfully acquired by them which they have not accounted for to the corporation, the procedure adopted was by way of petition which prayed for an order that the liquidator be directed in the company's name to take action against the respondent for the recovery of the property and assets alleged to be the property of the company and other relief.

At page 276 of the above judgment, His Lordship Lord Blanesburgh, speaking of the procedure to be adopted in this type of application, said:

> A Judge in winding-up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding-up. In authorizing proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success; where, as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.

The principle in this Privy Council case was applied in the case of *Aliprandi v. Griffith Vintners Pty Ltd (in liq) & Anor.* Australian Corporations and Securities Reports Vol. 6 (1991-1992). The facts of the case were as follows:

> Partnership Pacific, a creditor, had H appointed as receiver and manager of the assets of a company of which the plaintiff was a contributory and former director. Later a liquidator was appointed. Without the authority of the liquidator, the plaintiff commenced action against Partnership Pacific and against H. The liquidator was not satisfied that any indemnity for costs given by the plaintiff would be adequate. There were no funds of the company and little prospect of any coming into the liquidator's hands, in his view. Partnership Pacific and a judgment against the plaintiff for RM1.3m which was stayed pending further order.
>
> The plaintiff sought orders *inter alia* that he be authorised to use the name of the company as co-plaintiff or that the liquidator ratify the commencement of the proceedings already instituted.
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> Held, making orders that the plaintiff be authorised to use the name of the company as co-plaintiff:
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> i. The Court has power to order that a contributory of a company in liquidation be authorised to use the company's name as a plaintiff.
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> ii. The proper approach of the Court to such an application requires it to consider the probable success of a contemplated action to see that any such action is not vexatious or merely oppressive. The case must have some arguable foundation.

iii. Following an examination of the claims advanced for the plaintiff, there was no arguable case against Partnership Pacific. H was appointed as receiver and manager as the agent of the company and not of Partnership Pacific which was not responsible for any breaches of duty by the receiver.

iv. There was an arguable case that there were breaches of duty committed by H as receiver and the plaintiff should be authorised to commence proceedings with the company as co-plaintiff against him alone.

v. There was no legitimate basis on which a costs order could be made against the liquidator in those proceedings.

vi. As a condition of the order made in the plaintiff's favour, the plaintiff must provide to the liquidator a deed of indemnity for any costs and pay RM5000 on account of the costs of the winding-up incidental to the contemplated proceedings.

We set out this authority above as illustrating the procedure adopted by the approving Judge in the application before granting leave.

The applicant's application in our view should have properly been an application because of a possible wrong doing by a liquidator and, therefore, under s. 305 of our Companies Act, 1965:

Section 305. Power of Court to assess damages against delinquent officers, etc.

(1) If in the course of winding-up it appears that any person who has taken part in the formation or promotion of the company or any part or present liquidator or officer has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator - or of any creditor or contributory examine into the conduct of that person liquidator or officer and compel him to repay or restore the money or property or any thereof with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication retainer -misfeasance or breach of trust or duty as the Court thinks just.

(2) This section shall extend and apply to and in respect of the receipt of any money or property by any officer of the company during the two years preceding the commencement of the winding-up whether by way of salary or otherwise appearing to the Court to be unfair or unjust to other members of the company.

(3) This section shall have effect notwithstanding that the offence is one for which the offender is criminally liable.

Our Federal Court in *Vijayalakshmi Devi d/o Nadchatiram v. Dr Mahadevan s/o Nadchatiram & 4 Ors* [1995] 3 AMR 2076 considered s. 305 of our Companies Act and at page 2091 said:

With respect to the misfeasance proceedings under s. 305 of the Act, Encik Sethu submitted the proceedings could only continue in the course of winding-up it could not proceed independently. Counsel submitted that under the section, the Court had summary jurisdiction over the directors or officers of the company for the misconduct.

The Court quoted s. 305(l) of the Act as above.

The Federal Court continued:

It would be correct to say that our s. 305(l) is based on s. 333 of the English Companies Act 1948, but the words "or duty" were taken from s. 305 of the Companies Act 1961 of the State of Victoria (In *re Kie Hock Shipping* [1985] 1 MLJ 411). However, it is settled law that s. 333 of the English Act did not create any new or distinct rights but only provided

summary remedy. In *Re B Johnson & Co. (Builders) Ltd.* [1955] Ch 634, 648, Evershed MR observed that s. 333 was merely a procedural section and did not establish a new tort. In *Cavendish Bentick v. Fenn* [1887] 12 App Cas 652 at p. 669, Lord Macnaghten said:

> Section 165 of the Act of 1862 (the misfeasance section, now s. 333 of the Act of 1948) has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company.

In re *Etic Ltd.* [1928] 1 Ch 861, 875, Maugham J stated that the section:

> is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to case where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would included a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company.

From the pleadings, we were satisfied that the appellant in bringing her claim under s. 305 of the Act was merely seeking a summary remedy in the courser of the winding-up of the company and that her claim was within the scope of the section.

We respectively agree with the learned Judge below that the applicant's application should be so dismissed but for the different reason than that given by the learned Judge. We think that s. 226(3) of the Act only applies where the action is against the company but, as submitted by Counsel for the applicant, in this case the action was against the liquidator we have held, that s. 305 of the Act applies.

While we agree that the applicant may proceed against the liquidator, we are however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding-up Judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation. The approach the learned Judge should take is as given in the Privy Council case of *Lyod-Owen v. Bull* cited above. A advised in that case, he has to obtain authority from a Judge below who will act liberally but must satisfy himself as to the probable success of this application and he has to give an assurance to the sanctioning Judge that this action is not vexatious or merely oppressive. The Court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like. Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs.